Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

LAURA ETTA STANLEY; SUEZETTE A. MINDER; WINTER RANDOLPH JOSEPH HILL, individually and as personal representative of the Estate of Winter Charles Joseph Hill, Deceased,

Petitioners

v.

TOWNSHIP OF CLAY; KENNETH L. CANODE; HERMAN MONTVILLE, JR.; GRAHAM RUMMEL; DENNIS SCHAIBLE; PHILLIP LEE WITHERSPOON, SR.; MARK WESTON; JAMES HAGGERTY; STEVE NOWICKI; MICHAEL WAITE,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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Introductory Statement

It is a material matter of record in the case below that on 9/28/98 the district court confrontationally, disparagingly, and without concern for impartiality, bench-ordered the petitioners' attorney to make a 30-day filing of a bench-dominated "consolidated amended complaint" — as shown in a transcript of a certain 9/28/98 "Motion To Dismiss" hearing (Appendix E, 45a-56a); and it is a material matter of record that the district court did not render, impartially or otherwise, any "opinion" as attributed to the district court in the 5/4/00 ORDER of the Court of Appeals (Appendix A, 1a).

Questions Presented For Review

1. Did the Court of Appeals err seriously in entering its 5/4/00 ORDER (Appendix A, 1a) in such a 23-word manner and form ["It is ORDERED that the judgment of the district court be, and it hereby is, affirmed upon the opinion of the district court."] so as not only to constitute a departure seriously far from the accepted and usual course of appellate proceedings, but so as, also, to constitute an afirmative appellate sanction of the district court's departure seriously far from the accepted, usual, and mandated, course of district court "dismissal" and "summary judgment" and 28 U.S.C. § 455(a) "recusal"proceedings — so as, altogether, to call seriously for the exercise of this Court's supervisory power?

2. Did District Judge Avern Cohn err seriously in entering his 4/16/99 MEMORANDUM AND ORDER (Appendix D, 33a-44a) containing his 3-page quarrelsome and self-exculpatory "Recusal" rejection (Appendix D, 34a-36a) of the petitioners' repeated requests for his self-executing observance of his 28 U.S.C. § 455(a) recusal as mandated in Roberts v Bailar, 625 F2d 125, 128-129 (CA 6,1980)?

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Parties

The names of the parties to the proceedings in the district court whose JUDGMENT (Appendix B, 2a) is sought to be reviewed are contained in the caption of the case.

Citations

The only official reports of orders in the case are: (1) the 5/4/00 ORDER of the Court of Appeals (Appendix A, 1a); (2) the district court's 4/16/99 JUDGMENT (Appendix B, 2a); and (3) the district court's 4/16/99 MEMORANDUM AND ORDER (Appendix D, 33a-44a).

Concise Statement Of The Basis For Jurisdiction In This Court

The ORDER of the Court of Appeals (Appendix A, 1a) was entered on May 4, 2000.

Constitutional Provisions And Statutes Involved In The Case

U.S. Const, Am IV: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Due Process Clause of U.S. Const, Am XIV, concerning the "shocks the conscience" - substantive due process right concerning homicidal deadly force action and conduct which "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses" as guaranteed by the Due Process Clause of the Fourteenth Amendment, and

as authoritatively described in Wilson v Beebe, 772 F2d 578, 581-586 (CA , 1985), citing Tennessee v Garner, 471 US 1, (1985).

42 U.S.C. § 1983: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. ..."

28 U.S.C. § 1331: "The district courts shall have original jurisdiction of all civil action arising under the Constitution, laws, or treaties of the United States."

28 U.S.C. § 455 (a): "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

Michigan Compiled Laws 600.2922. **Wrongful death** Sec. 2922: **"Liability of tort-feasors; exclusiveness of remedy.** Whenever the death of a person or injuries resulting in death shall be caused by wrongful act, neglect, or fault of another, and the act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, the person who or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death was caused under circumstances that constitute a felony."

Michigan Compiled Laws 600.2922.(6): "(6) **Damages; distribution**. In every action under this section the court or jury may award damages as the court or jury shall consider fair and equitaqble, under all the circumstances including reasonable medical, hospital, funeral, and burial expenses for which the estate is liable, reasonable compensation for the pain and suffering, while conscious, undergone by the deceased person during the period intervening between the time of injury and death; and damages for the loss of financial support and the loss of the society and companionship of the deceased. The proceeds of a settlement or judgment in an action for damages for wrongful death shall be distributed as follows: ..."

Concise Statement Of The Case Setting Out The Facts Material To Consideration Of The Questions Presented

All the facts material to consideration of the questions presented are set out, which is to say pleaded, in petitioner Laura Etta Stanley's COUNT ONE 42 USC § 1983/Restatement, Second, Torts § 46(1) Consolidated Amended Complaint (Appendix C, 5a-18a).

All the facts material to consideration of the questions presented are set out, which is to say pleaded, in petitioner Suezette A. Minder's COUNT TWO Restatement, Second, Torts § 46(1)/ 28 USC 1331 Consolidated Amended Complaint (Appendix C, 18a-22a).

All the facts material to consideration of the questions presented are set out, which is to say pleaded, in petitioner Winter Randolph Joseph Hill's COUNT THREE Individual Restatement, Second, Torts § 46(1) 28 USC § 1331 Consolidated Amended Complaint (Appendix C, 22a-25a).

All the facts material to consideration of the questions presented are set out, which is to say pleaded, in petitioner Winter Randolph Joseph Hill's COUNT FOUR Plaintiff Personal Representative's 42 USC § 1983 Consolidated Amended Complaint (Appendix C, 26a-28a).

All the facts material to consideration of the questions presented are set out, which is to say pleaded, in petitioner Winter Randolph Joseph Hill's COUNT FIVE Plaintiff Personal Representative's MCL 600.2922(6) Intentional-Bad Faith-Wrongful Act-Gross Negligence Complaint For Winter Charles Joseph Hill's Pain and Suffering While Conscious Between The Time Of Injury And Death (Appendix C, 29a-30a).

All the facts material to consideration of the questions presented are set out, which is to say pleaded, in petitioner Winter Randolph Joseph Hill's COUNT SIX Plaintiff Personal Representative's MCL 600.2922(6) Intentional-Bad Faith-Wrongful Act-Gross Negligence Complaint For His Father's Loss of The Society and Companionship Of Winter Charles Joseph Hill , Deceased (Appendix C, 30a-31a).

All the facts material to consideration of the questions presented are set out, which is to say pleaded, in petitioner Winter Randolph Joseph Hill's COUNT SEVEN Plaintiff Personal Representative's MCL 600.2922(6) Intentional-Bad Faith-Wrongful Act-Gross Negligence Complaint For Suezette A. Minder's Loss Of The Society And Companionship Of Her Half Blood Brother (Appendix C 31a-32a).

Appendix F, 57a-63a, is a transcript of a certain 4/1/98 "Defendant's Partial Motion To Dismiss" district court proceeding showing the facts and circumstances of the district court's (District Judge Avern Cohn's) 25-year old adversarial and 4/1/98 confrontational courthouse encounters with the petitioners' attorney.

Reasons For Granting The Petition

Rule 1, in material and mandatory part, provides: "These rules govern the procedure in the United States district courts in all suits of civil nature . . . They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."; and Rule 8(f) is entirely mandatory: "All pleadings shall be so construed as to do substantial justice."

Conley v Gibson, 355 U.S. 41 (1957) at 45-46: ". . . In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. ..."

Jenkins v McKeithen, 395 U.S. 411 (1969), at 421: "For purposes of a motion to dismiss, the material allegations of the complaint are taken as admitted. ...And, the complaint is to be liberally construed in favor of the plaintiff. See, Fed. Rule Civ. Proc. 8(f); . . ."

Scheuer v Rhodes, 416 U.S. 232 (1974), at 236: "When a federal court reviews the sufficiency of a complaint, before reception of any evidence ... its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, ... the allegations of the complaint should be construed favorably to the pleader."

Gomez v. Toledo, 446 U.S. 635 (1980), at 638-641: "Section 1983 provides a cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" by any person acting "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." 42 USC § 1983 [42 USCS § 1983]. This statute, enacted to aid in "the preservation of human liberty and human rights." Owen v. City of Independence, 455 US 622, 636, 63 L Ed 2d 637, 100 S Ct 1398 (1980), quoting Cong Globe, 42d Cong. 1st Sess, App 68 (1871) (Rep. Shellabarger), reflects a congressional judgment that a "damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees," 445 US, at 651, 63 L Ed 2d 673, 100 S Ct 1398. As remedial legislation, § 1983 is to be construed generously to further its primary purpose. ... Nothing in the language or legislative history of § 1983, however, suggests that in an action brought against a public official whose position might entitle him to immunity if he acted in good faith, a plaintiff must allege bad faith in order to state a claim for relief. By the plain terms of § 1983, two - and only two - allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law. See Monroe v. Pape, 365 US 167, 171, 5 L Ed 2d 492, 81 S Ct 473 (1961). ...Moreover, this Court has never indicated that qualified immunity is relevant to the existence of the plaintiff's cause of action; instead we have described it as a defense available to the official in question. ... Since qualified immunity is a defense, the burden of pleading it rests with the defendant. ..."

As manifestly shown on the face of the petitioners' seven-count Consolidated Amended Complaint (Appendix C, 3a-32a):

(1) COUNT ONE petitioner Laura Etta Stanley states a claim upon which relief can be granted (Appendix C, 3a-18a); and

(2) COUNT TWO petitioner Suezette A. Minder states a claim upon which relief can be granted (Appendix C, 18a-22a); and

(3) COUNT THREE petitioner Winter Randolph Joseph Hill states a claim upon which relief can be granted (Appendix C, 22a-25a); and

(4) COUNT FOUR petitioner Winter Randolph Joseph Hill's Personal Representative 42 USC § 1983 Consolidated Amended Complaint states a claim upon which relief can be granted (Appendix C, 26a-28a); and

(5) COUNT FIVE petitioner Winter Randolph Joseph Hill's Personal Representative's MCL 600.2922(6) Intentional-Bad Faith-Wrongful Act-Gross Negligence Complaint For Winter Charles Joseph Hill's Pain And Suffering While Conscious Between The Time Of Injury And The Time Of Death states a claim upon which relief can be granted (Appendix C, 29a-30a): and

(6) COUNT SIX petitioner Winter Randolph Joseph Hill's Personal Representative's MCL 600.2922(6) Intentional -Bad Faith-Wrongful Act-Gross Negligence Complaint For His Father's Loss Of The Society And Companionship Of Winter Charles Joseph Hill, Deceased, states a claim upon which relief can be granted (Appendix C, 30a-31a); and

(7) COUNT SEVEN petitioner Winter Randolph Joseph Hill's, Personal Representative's MCL 600.2922(6) Intentional-Bad Faith-Wrongful Act-Gross Negligence Complaint For Suezette A. Minder's Loss Of The Society And Companionship Of Her Half Blood Brother states a claim upon which relief can be granted (Appendix C, 31a-32a).

A summary judgment is properly granted only where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Summary judgment is a lethal weapon, and courts must be mindful of its aims and targets and beware of overkill in its use. Brunswick Corporation v Vineberg, 370 F2d 605, 608, 612 (CA 5, 1959).

Gregg v. Allen-Bradley Co., 801 F2d 859 (CA 6, 1986), at 861: "Summary judgment is an appropriate means of disposing of a case where there is no genuine issue as to material fact. Fed. R. Civ. P. 56 (c). The burden is on the moving party to show conclusively that no genuine issue of material fact exists. Smith v. Hudson, 600 F. 2d 60, 63 (6th Cir.), cert. denied, 444 U.S. 986, 100 S.Ct. 495, 62 L. Ed. 2d 415 (1979). The district court must view the evidence with all inferences drawn therefrom read in the light most favorable to the party opposing the motion. Id."

Employers Insurance of Wassau v Petroleum Specialties, Inc., 69 F3d 98 (CA 6, 1995), at 101: "This court reviews de novo the district court's grant of Appellees' motion for summary judgment. Boggs v Eagle-Picher Indus, Inc., 957 F2d 268, 271 (6th Cir.), cert. denied, ___ U.S. ___ , 113 S. Ct, 466, 121 L.Ed. 2d 374 (1992). This court must affirm the district court only if it determines that the pleadings, affidavits, and other admissions show 'there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' Fed. R. Civ. P. 56(c). ..."

Routman v Automatic Data Processing, Inc., 873 F2d 970 (CA 6, 1989), at 971: "A district court may properly enter summary judgment sua sponte where the record discloses the absence of an issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 92 L.Ed. 2d 202 (1986). However, before summary judgment may be granted against a party, Fed.R.Civ.P. 56(c) mandates that the party opposing summary judgment be afforded notice and a reasonable opportunity to respond to all issues to be considered by the court. Portland Retail Druggist Ass'n v. Kaiser Foundation Health Plan, 662 F.2d at 645. Rule 56(c) requires at a minimum that an adverse party be extended at least ten days notice before summary judgment may be entered. Rule 56(c); Beck v. Borden, Inc., 724 F.2d 44 (6th Cir. 1984); Kistner v. Califano, 579 F.2d 1004, 1005 (6th Cir.1978) (per curiam).

"Noncompliance with the time provision of the rule deprives the court of authority to grant summary judgment, ... unless the opposing party has waived this requirement, ... or there has been no prejudice to the opposing party by the Court's failure to comply with this provision of the rule." Kistner, 579 F. 2d at 1005 (citations omitted). See also Winbourne v. Eastern Air Lines, Inc., 632 F. 2d 219 (2d Cir. 1980); Management Investors v. United Mine Workers of America, 610 F. 2d 384 (6th Cir. 1979); Adams v. Campbell County School Dist., 483 F. 2d 1351, 1363 (10th Cir. 1973); Winfrey v. Brewer, 570 F. 2d 761, 764 (8th Cir. 1987) ("[T]he procedural requirements of Rule 56 are to be strictly adhered to.").

It is a material matter of record that neither the municipal respondent Township of Clay, nor any one of the six individual municipal respondent police officers (Canode, Montville, Rummel, Schaible, Witherspoon, and Weston), nor any one of

the three individual respondent state police officers (Haggerty, Nowicki, Waite), either answered, or denied, or otherwise defended, all, or any part of the petitioners' seven-count Consolidated Amended Complaint claims and causes of action (Appendix C, 3a-32a); and the district court erred seriously in entering his unauthorized and improper sua sponte 4/16/99 JUDGMENT IN A CIVIL CASE (Appendix B, 2a) in such a 19-word manner and form ["IT IS ORDERED AND ADJUDGED that defendants' motion for summary judgment is GRANTED and the above case is DISMISSED."] so as, altogether, to constitute a departure seriously far from the accepted, and usual, and mandated, course of district court "dismissal" and "summary judgment" and 28 U.S.C. § 455(a) "recusal" proceedings - so as, altogether, to call for the exercise of this Court's supervisory power.

28 U.S.C. § 455(a) provides that a judge shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned. The language of 28 U.S.C. § 455(a) sets up an objective standard, rather than the subjective standard set forth in the prior statute. According to the report of the House Judiciary Committee, the general standard of section 455(a) was designed to promote the public's confidence in the impartiality and integrity of the judicial process by saying, in effect, that if any reasonable factual basis for doubting the judge's impartiality exists, the judge shall disqualify himself. Because § 455(a) focuses on the appearance of impartiality, a judge faced with a potential ground for disqualification ought to consider how his participation in a given case looks to the average person on the street. Use of the word might in the statute was intended to indicate that disqualification should follow if the reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality. Potashnick v. Port City Construction Co., 609 F. 2d 1101, 1110-

1111 (CA 5, 1980).

Roberts v. Bailar, 625 F. 2d 126 (CA 6 1980), at 128-129: "... Section 455(a) is a self-executing provision for the disqualification of federal judges. There is no particular procedure that a party must follow to obtain judicial disqualification under § 455(a). Instead the section sets forth a mandatory guideline that federal judges must observe sua sponte. ... To promote confidence in the impartiality of the federal judicial system, the Congress in 1974 shifted the focus of § 455(a). "Any ... judge," § 455(a) now provides, "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." No longer is a judge's introspective estimate of his ability to hear a case the determinate of disqualification under § 455. The standard now is objective. It asks what a reasonable person knowing all the relevant facts would think about the impartiality of the judge. "[I]f there is a reasonable factual basis for doubting the judge's impartiality," the Congressional Committee reports on the 1974 amendment to § 455 explain, the judge "should disqualify himself and let another judge preside over the case." Even where the question is close, the judge whose impartiality might reasonably be questioned must recuse himself from the trial."

SCA Services, Inc. v. Morgan, 557 F. 2d 110 (CA7, 1977), at 113: "In 1972, the House of Delegates of the American Bar Association adopted a new Code of Judicial Conduct which advocated the "appearance of justice" standard for disqualification. One year later the Judicial Conference applied this new code to all federal judges. ... Finally, in 1974, Congress enacted a new section 455 which was designed to reconcile the 1972 Code of Judicial Conduct with the federal statutes. Its purpose was to eliminate "dual standards, statutory and ethical, couched in uncertain language [that] had the effect of forc-

ing a judge to decide either the legal or ethical issue at his peril." Congress also intervened to overrule the concept that close cases involving disqualification should be resolved on the ground that a judge had a "duty to sit." ... The new statute contains the general, all-inclusive objective standard of the 1972 Judicial Code: a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a)."

Fredonia Broadcasting Corp. Inc. v. RCA Corporation, 569 F2d 251 (CA 5, 1978), at 256: "...[W]e are concerned with the purity of the judicial process and its institutions." Kinnear-Weed Corp. v. Humble Oil & Refining Co., 403 F. 2d 439-40 (5th Cir. 1968), ... The Supreme Court has repeatedly stated that "justice must satisfy the appearance of justice." Offut v. United States, 348 U.S. 11, 14, 75 S. Ct. 11, 13, 99 L. Ed. 11 (1954); accord, In re Murchison, ... 99 L. Ed. 942 (1955); ... The Code of Judicial Conduct for United States Judges ... expresses concern that the judicial system be protected from the appearance of impropriety in the eyes of both the parties and the general public."; and at 257: "Section 455(a) is a general safeguard of the appearance of impartiality ..."

District Judge Avern Cohn erred seriously in making and entering his 4/16/99 MEMORANDUM AND ORDER (Appendix D, 33a-44a) containing , as it does, his 3-page quarrelsome and self-exculpatory rejection (Appendix D, 37a-41a) of the petitioners' four repeated requests for his self-executing observance of his 28 U.S.C. § 455(a) recusal as mandated in: (1) SCA Services, Inc. v. Morgan, supra, (2) Potashnick v. Port City Construction Corp. Inc., supra and (3) Roberts v. Bailar, supra,— because if an "average person on the street," or if a reasonable person, were to know all the facts and circumstances

of the confrontational origin (Appendix E, 45a-56a), and the unauthorized and improper sua sponte "summary dismissal" (Appendix B, 2a), of the petitioners' seven-count Consolidated Amended Complaint calims and causes of action (Appendix C, 3a-32a), that "average person on the street," and that reasonable person, not only might, but would, harbor doubts and questions about District Judge Avern Cohn's impartiality; and, further, if an "average person on the street," and if a reasonable person, were to know the facts and circumstances of then attorney Avern Cohn's 25-year-old adversarial, and his (District Judge Avern Cohn's) 4/1/99 confrontational, encounters with the petitioners' attorney (Appendix F, 57a-63a) that "average person on the street," and that reasonable person, not only might, but would, harbor further doubts and further questions about the district court's impartiality.

Kinnear-Weed Corporation v. Humble Oil & Refining Company, supra, at 439: "... [A]s we several times make clear, this is a matter which transcends the interests of the parties. The purity of the judicial process and its institutions is the thing at stake. ..."

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,
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Date: July 31, 2000